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C.L., Appellant)	
)	
and)	Docket No. 09-1246
)	Issued: December 16, 2009
U.S. POSTAL SERVICE, REMOTE ENCODING)	
CENTER, Salt Lake City, UT, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On April 15, 2009 appellant timely appealed the March 11, 2009 merit decision of the Office of Workers' Compensation Programs, which found an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.¹

The issues are: (1) whether appellant received an overpayment of \$4,124.00 for the period July 13 through August 29, 2008; and (2) whether the Office properly denied waiver of recovery.

¹ The current record includes evidence received after the Office issued its March 11, 2009 decision. The Board's review of a case is limited to the evidence in the case record that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c)(1) (2009).

FACTUAL HISTORY

Appellant, a 38-year-old data conversion operator, has an accepted occupational disease claim for aggravation of left lateral epicondylitis, which arose on or about January 28, 2008. On September 4, 2008 the Office authorized an emergency payment and appellant received \$4,124.01 for the period July 13 through August 29, 2008. On September 12, 2008 the Office issued two checks, again totaling \$4,124.00 for the period July 13 through August 29, 2008.

In an October 31, 2008 preliminary determination, the Office advised appellant that she received an overpayment of \$4,124.00 for the period July 13 through August 29, 2008. The Office explained that an emergency payment was issued on September 5, 2008 by the National Office and on September 12, 2008 the Denver District Office made payment for the same period of disability. Appellant was advised that she was not at fault in creating the overpayment.

Appellant subsequently requested a telephone conference with the district Office regarding possible waiver of the overpayment. She did not challenge the Office's determination regarding either the fact or amount of the overpayment. Appellant submitted a November 18, 2008 overpayment recovery questionnaire (Form OWCP-20), an unsigned copy of her 2007 federal individual income tax return (Form 1040), as well as bank and credit card statements. The overpayment recovery questionnaire listed total monthly expenses of \$2,264.15, of which \$740.00 represented unspecified "Other expenses." Appellant reported zero (\$0.00) monthly income and liquid assets (cash/checking/savings) totaling \$93.49.

During the February 6, 2009 conference, appellant indicated that based on her last two paychecks from work she had gross earnings of \$1,887.00.² She acknowledged that she had received compensation from the Office.³ Appellant provided additional information regarding her monthly expenses, including housing costs,⁴ utilities, a \$550.00 car payment and \$395.00 in unreimbursed medical expenses. The reported monthly expenses totaled \$2,004.00.

By decision dated March 11, 2009, the Office affirmed the fact and amount of the overpayment, as well as the preliminary finding that appellant was not at fault in creating the \$4,124.00 overpayment. It further found that appellant was not entitled to waiver of recovery of the overpayment.

² Appellant worked a part-time schedule due to her accepted injury and she was paid biweekly. On March 3, 2009 the employing establishment advised the Office that appellant's gross pay for the two-week period ending February 27, 2009 was \$942.21.

³ The Office paid appellant net/gross compensation of \$1,328.20 for the period January 3 through 30, 2009. In addition, from January 31 through February 27, 2009, appellant received net/gross wage-loss compensation of \$1,341.10.

⁴ Appellant reported \$600.00 in housing costs, which was consistent with the information previously included in the November 18, 2008 overpayment recovery questionnaire. During the February 6, 2009 conference, she indicated that the \$600.00 housing cost was split with her mother, who actually owned the property but did not reside there.

LEGAL PRECEDENT -- ISSUE 1

An injured employee may receive compensation for lost wages due to either total or partial disability.⁵ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under the regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁶ When a claimant receives a duplicative compensation payment for a period that she has already received compensation for wage loss, an overpayment is created.⁷

ANALYSIS -- ISSUE 1

The record demonstrates that appellant was paid wage loss twice in the amount of \$4,124.00 for the period July 13 through August 29, 2008. Although she is entitled to compensation for lost wages due to her temporary total disability, she is not entitled to be paid twice for the same period of wage loss.⁸ The Board finds that appellant was overpaid \$4,124.00 for the period July 13 through August 29, 2008. The Board also concurs with the Office's finding that she was not at fault in creating the overpayment.

LEGAL PRECEDENT -- ISSUE 2

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience.⁹ Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses and the beneficiary's assets do not exceed a specified amount as determined by the Office.¹⁰ Additionally, recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when any individual, in reliance on such payment or on notice

⁵ 20 C.F.R. §§ 10.401, 10.403.

⁶ 5 U.S.C. § 8129(a).

⁷ See *Lawrence J. DuBuque*, 55 ECAB 667, 670-71 (2004).

⁸ See also *J.M.*, Docket No. 08-2244 (issued June 10, 2009); *E.B.*, Docket No. 06-1585 (issued February 22, 2007).

⁹ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹⁰ 20 C.F.R. § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (October 2004).

that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹¹

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office.¹² This information is necessary for determining whether a waiver of recovery of the overpayment is warranted.¹³ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁴

ANALYSIS -- ISSUE 2

The Office's March 11, 2009 decision denied waiver of recovery of the overpayment. The senior claims examiner stated that appellant had not provided "justification for the Office to waive recovery of the overpayment." The decision noted that appellant submitted an overpayment recovery questionnaire and that a conference was held on February 6, 2009 regarding the issue of waiver of recovery. However, the March 11, 2009 decision made no mention of appellant's reported monthly expenses, her monthly income or her available assets. The Office concluded that "the financial information received has not established the (sic) basis for granting waiver...."

Notwithstanding the above-noted deficiencies in the Office's March 11, 2009 decision, the Board finds that appellant is not entitled to waiver of recovery of the overpayment. The record indicates that appellant's monthly income was approximately \$3,220.00, which included gross wages from part-time employment and compensation benefits.¹⁵ In her November 18, 2008 overpayment recovery questionnaire, appellant reported total monthly expenses of \$2,264.15. The Office's March 11, 2009 decision did not identify any specific issues with appellant's monthly expenses. Therefore, accepting all of appellant's claimed expenses, her monthly income exceeds monthly expenses by approximately \$1,000.00. On appeal, she argued that the Office should take into account her net earned wages of \$1,011.23, rather than her gross earnings of \$1,887.00. However, even when factoring in net wages, appellant's total monthly income, including compensation benefits, still exceeds her reported monthly expenses by approximately \$80.00. An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁶ Regardless of whether net earnings or gross earnings are utilized, appellant fails to meet the minimum \$50.00 threshold.¹⁷ She has not demonstrated that

¹¹ 20 C.F.R. § 10.437(a), (b).

¹² *Id.* at § 10.438(a).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ For the months of January and February 2009, appellant averaged \$1,334.65 per month in wage-loss compensation.

¹⁶ *George A. Rodriguez*, 57 ECAB 224, 232 n.24 (2005).

¹⁷ *Id.*; see *Otto A. Fernandez*, 55 ECAB 558, 562 (2004) (pretax income cannot be said to be funds available for use in determining whether recovery would defeat the purpose of the Act).

recovery of the overpayment would defeat the purpose of the Act. Additionally, appellant has not alleged, nor does the record indicate, that she relinquished a valuable right or changed her position for the worse as a result of receiving the overpaid benefits. As such, there is no basis to find that recovery of the overpayment would be against equity and good conscience.

CONCLUSION

Appellant received an overpayment of \$4,124.00 for the period July 13 through August 29, 2008, for which she was not at fault. The Board finds that she is not entitled to waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board